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# Supreme Court of the United States

OCTOBER TERM, 1990

JESSE J. SANCHEZ,
*Petitioner,*
*vs.*
CITY OF SANTA ANA,
*Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## PREFATORY STATEMENT

Petitioner simply refuses to allow any aspect of this case to rest without multiple judicial challenges. In this Petition, petitioner asks the Court to reconsider the Ninth Circuit Court of Appeals' determination that his prior recovery for permanent stress-related injuries before the California Workers' Compensation Appeals Board ("WCAB") bars his attempt to obtain a second recovery for the same injuries. Thus, petitioner seeks to undermine the important policy of judicial finality and repose.

In essence, petitioner asks this Court to grant a writ of certiorari to determine: (1) whether or not an unchallenged decision and award of damages by a state administrative agency is entitled to preclusive effect in a subsequent Section 1983 case, a question which this

Court already answered five years ago, and (2) whether a defense which was not available when the case was filed, but which was raised before the district court (in a brief filed before the damages phase of trial) was raised in a timely manner.

The first issue has already been resolved in University of Tennessee v. Elliott, 478 U.S. 788, 106 S.Ct. 3220 (1986), and that case is being followed throughout the circuit courts. Nonetheless, after having adjudicated the nature and extent of his alleged emotional injuries, and after having recovered damages for the same alleged injury, petitioner claims that he should be allowed to adjudicate that claim once again so that he can attempt to improve his recovery.

The second issue raised is completely without merit and, in any

event, it is clearly not sufficiently "special and important" to warrant this Court's consideration.

Accordingly, for these reasons, explained in more detail below, the Petition should be denied.

## STATEMENT OF THE CASE

### I. PETITIONER'S HIRING

Jesse J. Sanchez ("petitioner") was employed by the City of Santa Ana Police Department (the "Department") from September 1975 to September 1979. He was hired as part of the Minority Officer Recruitment Effort ("MORE") and the Community-Oriented Policing ("COP") program, which, through the efforts of Chief of Police Raymond C. Davis, made available many new police officer positions during 1973-74, most of which

were filled by minorities, primarily Hispanics. [Appendix D.5] Contrary to petitioner's misstatement in his Petition, he was hired as part of these voluntary recruitment programs, not as a result of any court decision, including the district court's decision in League of United Latin American Citizens v. City of Santa Ana, 410 F.Supp. 873 (C.D. Cal. 1976) (this interim ruling was not made until the year following Sanchez's hire, and the case was not finally resolved until 1978 by consent decree, which did not impose any hiring order on the Department). [Appendix M.7]

## II. PETITIONER'S INCREASING PERFORMANCE PROBLEMS

Beginning in August 1978, petitioner's work performance began to decline, as he showed an increasing

unwillingness to follow established Department rules and procedures. Petitioner was counseled repeatedly, but showed no improvement. Due to these performance problems, in late February 1979, petitioner was not recommended for continued merit pay. [ER 701-03] He was told at that time that he might lose his present merit pay due to the decreasing level of his work performance. [Appendix D.6] Two weeks later, on March 15, 1979, petitioner left work during the day without completing his shift and with no apparent reason for doing so. [Appendix D.6] Shortly thereafter, petitioner's merit pay steps were officially removed, in accordance with the City's existing procedures. [Appendix D.6] This issue is discussed at length in the City's Cross-Petition for Writ of Certiorari, filed concurrently herewith.

## III. PETITIONER'S WORK-RELATED STRESS AND EVENTUAL RESIGNATION

Petitioner then requested and was granted three medical leaves of absence. [Appendix D.7] In March and May 1979, petitioner also filed two separate workers' compensation claims, alleging that he was suffering from work-related stress. The second of those claims was dismissed as being unnecessary and redundant to the first. [ER 916-17]

On September 6, 1979, after four months of medical leave of absence, petitioner wrote the City Personnel Director, stating that his doctor had authorized his return to work and requesting information about his assignment. [Appendix D.7] He was told that he would be in patrol. Then, on September 10, 1979, he wrote another letter stating that his doctor advised that he could perform the patrol assign-

ment, but that he refused to return to work unless his merit pay, which had been removed in accordance with the City Charter and merit pay resolution, was restored immediately. [Appendix D.7] After the City refused his demand, petitioner wrote a third letter in which he resigned, stating that his resignation was a result of the City's refusal to restore his merit pay. [Appendix D.7-8]

## IV. PETITIONER'S WORKERS' COMPENSATION RECOVERY

Petitioner then amended his previously filed workers' compensation claim to allege permanent emotional disability. Petitioner also sought recovery under Section 4850 of the California Labor Code, which allows injured police officers to recover a year's leave of absence pay for injury or

illness arising in the course of his or her duties. [Appendix N] The Workers' Compensation Appeals Board held a hearing on petitioner's claims on September 20, 1981. Both parties were represented by counsel at the hearing. [ER 1103, 1107] After hearing from both sides, the WCAB determined that it did not have jurisdiction to award the leave of absence pay requested under Section 4850, because Sanchez had resigned. The WCAB did, however, accept jurisdiction over petitioner's remaining claims for permanent emotional injuries. [ER 1103]

Thus, the WCAB awarded petitioner $8,662.50 for his permanent partial disability (30 1/2%) caused by stress-related emotional injuries occurring during his employment, up to September 10, 1979. [ER 1103] Petitioner misstates in his Petition that he was awarded disability only from March to May

1979 -- petitioner may have only worked from March to May 1979, but he was awarded benefits covering the period from March to September, at which time he resigned. Further, because he was compensated for a "permanent disability," he received his emotional distress award for any injuries continuing into the future.

## V. PROCEDURAL HISTORY OF CASE

Petitioner and two other Latino Police Officers filed this action in United States District Court, Central District of California, on May 20, 1979,[1/]

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1/ The original parties to this action were: (1) plaintiffs Jesse J. Sanchez, Victor Torres and Robert Caro, and (2) defendants City of Santa Ana, City of Santa Ana Police Department, Police Chief Raymond C. Davis, Personnel Director, Donald Bott, Captain E.B. Hansen, Captain Robert Stebbins, Lieutenant Oliver Lee Drummond, Lieutenant Michael Lewellen, Lieutenant Dale Sterzer, Lieutenant Norwood Williams, Lieutenant Lawrence Pitzer, Sergeant Gary Dixon, Sergeant William Bruns, Sergeant John Collins, Sergeant (continued...)

alleging various constitutional and common law claims arising out of their employment and/or the termination of their employment with the Department. [Appendix D.8] Plaintiffs named the City, Chief Davis and sixteen (16) other individuals as defendants.

On June 3, 1983, the district court entered partial summary judgment[2/] only in favor of petitioner and only against the City and Chief Davis[3/] as to petitioner's procedural due process claim relating to

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1/ (...continued)
Richard Faust, Sergeant James McDaniels, Sergeant Michael Lanners, and Sergeant John Dittus. The claims of Torres and Caro against all defendants, as well as Sanchez's claims against all defendants except for the City of Santa Ana, were dismissed by the District Court and are the subject of the companion appeal, attached hereto as Appendix O.

2/ Contrary to petitioner's mischaracterization of the record, respondent did dispute the issues stated in petitioner's Motion for Partial Summary Judgment. [ER 939-48; ER 1223-28]

3/ The District Court later exonerated Chief Davis from personal liability. [Appendix D.8]

the removal of his merit pay. [Appendix H.1-2] Then, after a 39-day trial which began in April 1985, the district court determined that the three plaintiffs had failed to present any evidence of discrimination or wrongful treatment. [ER 421-27] In fact, Judge Kenyon stated that the evidence showed they had been treated "with kid gloves," that "no reasonable person could find from the evidence presented that the Department engaged in any discriminatory actions" and that plaintiff Sanchez had used the discrimination laws as a "sword" to "intimidate or harass individuals into conforming their conduct to [his] dictates." [ER 421-27] Thus, on June 18, 1985, the court directed a verdict in favor of the City and all of the individual defendants, with the exception of petitioner's procedural due process claim against the City (relating to the removal

of his merit pay) for which partial summary judgment previously had been granted. [Appendix F.9]

In October 1985, the district court began a new trial (with the same jury) for the sole purpose of determining petitioner's damages for the alleged procedural due process violation related to the removal of his merit pay. [Appendix D.9] In pre-trial briefing, the City (respondent herein) argued that petitioner's claim for emotional distress damages was precluded by his previous adjudication and recovery before the WCAB. [ER 1096-99] Only after the district court had rejected the preclusion argument, petitioner approached respondent and asked respondent to agree upon the amount of income that would have been earned by petitioner under various pay steps, and further asked respondent to stipulate that any recovery should be

offset by including petitioner's previous workers' compensation recovery, as part of his actual earned income for 1980. [ER 1015] Respondent agreed to this stipulation only because the district court had previously ruled on its preclusion argument, and respondent sought to facilitate a presentation of the evidence. Petitioner mischaracterizes the record in his Petition by stating that "Respondent elected, by stipulation with petitioner, to have the sum received in the WCAB proceeding setoff . . ." (See Petition, p. 53). Respondent never made an "election" between two alternative theories and never abandoned its preclusion argument.

At trial, the jury awarded petitioner $400,000 in back and future pay for a "constructive discharge" because of the alleged procedural due process violation in the manner of his

merit pay removal, and $500,000 in damages for emotional distress arising from this procedural due process violation. [Appendix D.9] Contrary to petitioner's misstatement, respondent did present evidence at the trial on damages, by both presenting its own witness and cross-examining petitioner's expert witnesses. Both parties appealed the decision. [ER 453, 454]

On appeal, the Ninth Circuit properly reversed the emotional distress award for petitioner, but affirmed petitioner's $400,000 verdict for the alleged procedural due process violation. [Appendix D.17] The Ninth Circuit determined that because emotional injuries are fully compensable under California's Workers' Compensation Act, and because petitioner had already sought and recovered damages for his emotional injuries in his claims before the WCAB, his emo-

tional distress claim arising from the same circumstances and time period in this action was barred, and he should not have been allowed an opportunity to obtain a double recovery. [Appendix D.17][4/] Thus, the Ninth Circuit vacated the jury's $500,000 award for emotional distress damages. [Appendix D.17] Petitioner's Petition for Rehearing before the Ninth Circuit was denied on February 22, 1991, and this Petition for Writ of Certiorari followed. [Appendix E]

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4/ Contrary to petitioner's statement, there is no indication that the Ninth Circuit "ignore[d] the fact that respondent had elected" an offset of petitioner's workers' compensation recovery. In fact, petitioner never raised the allegation that the parties had stipulated to an offset before the Ninth Circuit in this appeal. Moreover, the Ninth Circuit did determine that respondent had not waived its right to assert preclusion. [Appendix D.16]

## ARGUMENT

### I.

### PETITIONER MISSTATES THE NINTH CIRCUIT'S DECISION BELOW - THE NINTH CIRCUIT CORRECTLY HELD THAT PETITIONER'S RECOVERY BEFORE A STATE ADMINISTRATIVE AGENCY PRECLUDES HIS RECOVERY FOR THE SAME INJURY UNDER SECTION 1983

#### A. THE NINTH CIRCUIT DETERMINED THAT PETITIONER'S RECOVERY BEFORE THE WCAB PRECLUDED A SECOND RECOVERY FOR EMOTIONAL DISTRESS INJURY AND DID NOT RELY UPON THE CALIFORNIA WORKERS' COMPENSATION SYSTEM'S EXCLUSIVITY PROVISION

First, petitioner erroneously argues that the Ninth Circuit's decision was based on the exclusive remedy provision of California's Workers' Compensation Act and that the Court's decision conflicts with other circuits in applying the exclusive remedy provisions of a state's workers' compensation system. (See Petition, pp. 20-28) Plaintiff, however,

completely mischaracterizes the basis of the Ninth Circuit's decision, and thus, misstates the primary issue herein.

The Ninth Circuit stated the issue herein as follows: "The City contends that Sanchez's claim in federal court for emotional distress is barred under res judicata principles by his state workers' compensation award. On this point the City prevails." [Appendix D.15-16] Similarly, in reaching its holding, the Ninth Circuit stated, "Sanchez has already recovered damages under the workers' compensation system for his emotional injuries. We therefore vacate the jury's damage award . . ." [Appendix D.17]

Thus, it is clear that the Ninth Circuit relied on the doctrine of res judicata (or preclusion) in reaching its decision to vacate the jury's award and did not (as Petitioner claims) rely on

the irrelevant exclusive remedy provisions of California's Workers' Compensation Act. Put simply, the Ninth Circuit recognized that petitioner elected to pursue a remedy for his alleged work-related emotional injuries through the workers' compensation system, that he obtained a monetary award for a permanent emotional disability without having to prove fault, and that he should not be allowed an opportunity to improve his award for the same injury in a subsequent federal court action.

Second, in his attempt to show that he is entitled to a second recovery under Section 1983, petitioner also misstates and mischaracterizes the entire nature of the workers' compensation system by describing it as a system of "limited compensation" in which there is no opportunity to raise "fault-based claims." Rather, workers' compensation

provides an opportunity for employees to recover fully for their work-related physical and emotional injuries, without regard to negligence or fault. See, e.g. Cal.Lab.Code § 3600. Thus, workers' compensation allows an employee such as petitioner to avoid having to prove fault in order to facilitate complete recovery -- it does not, as petitioner argues, prevent the employee from asserting "fault-based" claims.

Petitioner's attack on the workers' compensation system, based on his unsupported claim that it denies a plaintiff's federal rights, is completely without merit. This Court upheld the constitutionality of workers' compensation systems and the important policies enforced by such systems long ago. Middleton v. Texas Power & Light Co., 249 U.S. 152, 163, 39 S.Ct. 227, 230-31 (1919). Moreover, plaintiff erroneously

states that the holding of Howlett v. Rose, ___ U.S. ___, ___, 110 S.Ct. 2430, 2443 (1990), is inconsistent with the exclusive remedy provision of a workers' compensation system. This is, at best, a twisted reading of Howlett. In fact, Howlett did not discuss workers' compensation exclusivity at all. Rather, in Howlett, this Court addressed whether a state law could prohibit federal claims while allowing a plaintiff to bring similar state claims. In holding that such a state statute which specifically discriminated against federal claims was unconstitutional, the Court also stated that it "must act with utmost caution" before challenging a neutral state rule which denies a federal right. Howlett, ___ U.S. at ___, 110 S.Ct. at 2440. Workers' compensation remedies are part of a "neutral state rule," and petitioner presents no basis in this case to chal-

lenge the remedies he voluntarily chose to pursue under California's workers' compensation system.

In sum, petitioner's first argument as to why this Court should grant a writ of certiorari is crucially flawed for at least two reasons: (1) the Ninth Circuit did not rely primarily on the exclusivity provisions of California's Workers' Compensation Act to reach its decision, and (2) there is no basis for contending that the remedial provisions of California's workers' compensation system, to which petitioner voluntarily availed himself, conflict with the remedies otherwise available under Section 1983.

## B. THE NINTH CIRCUIT CORRECTLY APPLIED THIS COURT'S RULE CONCERNING THE PRECLUSIVE EFFECT OF A STATE ADMINISTRATIVE DECISION IN A SUBSEQUENT SECTION 1983 ACTION

Petitioner's second argument as to why this Court should issue a writ of certiorari is that the Court should determine whether claim preclusion should apply to an administrative agency's findings in a subsequent Section 1983 suit. Petitioner ignores the fact, however, that this issue has already been decided by the United States Supreme Court, and this Court's rule is being followed by the circuit courts.

Through a series of recent decisions, this Court has established the rules to determine the preclusive effect of a state administrative agency's decision in a case subsequently brought in federal court. First, in Kremer v. Chemical Construction Corp., 456 U.S.

461, 102 S.Ct. 1883 (1982), this Court determined that under 28 U.S.C. § 1738, a federal court deciding a Title VII claim must give preclusive effect to a decision of a state court which upheld a state administrative agency's finding of no discrimination.

Second, in Migra v. Warren City School Dist., 465 U.S. 75, 104 S.Ct. 892 (1984), this Court determined that a state court's judgment reviewing an administrative decision would have the same preclusive effect in a subsequent Section 1983 action that the state court would give the decision. Thus, in these two cases, the Court established that state administrative determinations were generally entitled to preclusive effect, in some cases depending upon the applicable state law. Furthermore, neither of these two decisions made any distinction

between "claim preclusion" and "issue preclusion."

Then, in University of Tennessee v. Elliott, 478 U.S. 788, 796-99, 106 S.Ct. 3220, 3225-3226 (1986), this Court answered the exact question which petitioner has presented herein. In Elliott, this Court held that when a state administrative agency acts in a judicial capacity and resolves disputed issues, the federal court deciding a subsequent Section 1983 claim should give the same preclusive effect to the agency's decision -- even if it is unreviewed by a state court -- as would be given under state law:

> "Accordingly, we hold that when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' (citation), federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts."

Id., 478 U.S. at 799, 106 S.Ct. at 3226.

In Elliott, the Court discussed the important policies which favor giving preclusive effect to administrative decisions. In particular, the Court focused on the need for judicial finality and repose, and the policies of avoiding repetitive litigation and conserving judicial resources. Elliott, 478 U.S. at 798-99, 106 S.Ct. at 3226. Moreover, this Court very recently reaffirmed the presumption generally favoring administrative preclusion. In Astoria Federal Savings & Loan Assoc. v. Solimino, ___ U.S. ___, ___ S.Ct ___, 59 U.S.L.W. 4616 (June 10, 1991),[5/] although the Court found that state administrative decisions

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5/ In Astoria, the Court also reiterated that the reasoning favoring administrative preclusion particularly applies in Section 1983 claims (as opposed to Title VII and ADEA claims). Id., 59 U.S.L.W. at 4617.

should not be given preclusive effect in ADEA actions, the Court stated:

> "We have long favored application of the common-law doctrine of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality. . . . To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution."

Id. (emphasis added).

Elliott's holding regarding the preclusive effect of state administrative decisions has also been followed throughout the circuit courts. See e.g., Fondel v. Grumman Aerospace Corp., 884 F.2d 657, 658-59 (2nd Cir. 1989) (following Elliott, yet denying preclusive effect to administrative decision due to New York law); Barnes v. McDowell, 848 F.2d 725, 730 (6th Cir. 1988) cert. denied, 488 U.S. 1007 (1989) (following Elliott, yet determining no preclusive effect to

Personnel Board's determination under state law); Stillians v. State of Iowa, 843 F.2d 276, 281, n.3 (8th Cir. 1988) (implying that under Elliott and in order to enforce policy of "repose," federal courts should apply res judicata to administrative decisions); Eilrich v. Remas, 839 F.2d 630, 632-33 (9th Cir. 1988), cert. denied, 488 U.S. 819, 109 S.Ct. 60 (1988)[6/] (following Elliott and holding that district court appropriately applied California law to give preclusive effect to administrative decision in subsequent Section 1983 action); Amoco Production Co. v. Heiman, 904 F.2d 1405, 1415 (10th Cir. 1990)

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6/ This Court has previously denied a petition for writ of certiorari which raised the same question presented for review herein. In Eilrich, 488 U.S. 819, 109 S.Ct. 60 (1988), Docket No. 87-1895, one question presented was "whether unreviewed legal conclusions of state agencies must be given collateral estoppel effect in subsequent actions under 42 U.S.C. § 1983." Id.

cert. denied, 111 S.Ct. 350 (1990) (following Elliott and determining that under state law administrative agency's determination is entitled to preclusive effect); Buckhalter v. Pepsi-Cola General Bottlers, Inc., 820 F.2d 892, 895 (7th Cir. 1987) (following Elliott and holding that determination by state Human Rights Commission was entitled to preclusive effect in Section 1983 claim); cf., Gjellum v. City of Birmingham, 829 F.2d 1056, 1062 (11th Cir. 1987) (holding that under Elliott, the federal court must apply state issue preclusion rules, but not claim preclusion rules).

Petitioner voluntarily sought a remedy before the WCAB for the same emotional distress injury claimed in the action before the district court. The WCAB made findings of fact and determined the nature and extent of petitioner's injury. Based upon the above

decisions, petitioner cannot now sidestep the WCAB's findings and relitigate his alleged emotional distress injury in an attempt to obtain a more lucrative award.

Thus, despite petitioner's attempts to confuse the issue by distinguishing between "claim preclusion" and "issue preclusion,"[7/] the Ninth Circuit herein applied the correct rule adopted by this Court and accepted by the circuit courts, when it held, "Whether Sanchez's compensation award for emotional injuries bars under res judicata principles his section 1983 claim for damages for emotional distress is answered by state law." [see Appendix D.17 (emphasis added)]

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7/ In its recent decision concerning the preclusive effect of a state administrative agency's decision in a subsequent ADEA action, this Court (as in its previous decisions) rejected any distinction between "claim" and "issue" preclusion. Astoria, ___ U.S. at ___, ___ S.Ct. at ___, 59 U.S.L.W. at 4617.

### C. THE NINTH CIRCUIT CORRECTLY DETERMINED THAT, UNDER CALIFORNIA LAW, PETITIONER'S RECOVERY HEREIN IS BARRED BY EITHER CLAIM OR ISSUE PRECLUSION

California courts apply the following rule to determine whether a subsequent case is barred under claim preclusion: "a judgment for the defendant is a bar to a subsequent action by the plaintiff on the same injury to the same right, even though he presents a different legal ground for relief." Slater v. Blackwood, 15 Cal.3d 791, 795, 126 Cal.Rptr. 225, 226 (1975) (citations omitted) (emphasis in the original).

Moreover, the California Supreme Court has stated that a prior judgment bars relitigation "on matters which were raised or could have been raised, on matters litigated or litigable." Busick v. Workmen's Compensation Appeals Board, 7 Cal.3d 967, 975, 104 Cal.Rptr. 42, 48

(1972) (emphasis added) (holding that assault and battery judgment bars second recovery under workers' compensation system). Thus, the Ninth Circuit herein correctly determined that under California law, petitioner's claim for emotional distress injuries arising out of his employment were "litigable" before the WCAB, and thus his WCAB recovery for emotional injuries precluded a second recovery on the same claim, citing California Labor Code § 3601 and Hollywood Refrigeration Sales Co., Inc. v. Superior Court, 164 Cal.App.3d 754, 757, 210 Cal.Rptr. 619, 620 (1985). [Appendix D.17]

The California Supreme Court has similarly defined issue preclusion as follows:

> ". . . a party will be collaterally estopped from relitigating an issue only if (1) the issue decided in a prior adjudication is identical with that presented in the action in

> question; and (2) there was a final judgment on the merits; and (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication."

Clemmer v. Hartford Ins. Co., 22 Cal.3d 865, 874, 151 Cal.Rptr. 285, 288 (1978).

The record establishing the elements of both claim and issue preclusion, and thus establishing the preclusive effect of petitioner's workers' compensation recovery, is clear:

1. In his action before the WCAB, petitioner raised his claims regarding his alleged emotional, stress-related injuries arising from his employment from March to September 1979. [ER 1103]

2. Petitioner's emotional distress claims arose from his employment, and thus, were

recoverable before the WCAB. [ER 1103]

3. The WCAB held a hearing regarding the nature and extent of petitioner's emotional, stress-related injuries arising out of his employment with respondent. [ER 1103]

4. Both petitioner and respondent were parties to the WCAB action and were present at the hearing. [ER 1103]

5. The WCAB awarded petitioner damages for his permanent disability caused by his emotional injuries. [ER 1103]

6. The WCAB award became final when petitioner chose not to appeal the decision to the California courts. [Appendix D.7]

Petitioner, however, mischaracterizes the record by arguing that the "state court was unable to address the merits of the claim" and "the state tribunal ruled that it lacked jurisdiction or authority to decide some or all of the claims or issues before it." (See Petition, pp. 41-42). The record belies these statements in at least three crucial ways.

First, petitioner was not "barred for jurisdictional reasons" from presenting the emotional distress claims that are the subject of this case. The emotional distress damages which petitioner sought in his Section 1983 action were for respondent's conduct during the period from March to September 1979.[8/]

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8/ By virtue of the district court's grant of summary judgment on the procedural due process claim and its dismissal of all other claims, the sole possible basis for petitioner's claim for emotional injuries under his Section 1983 claim (continued...)

This is precisely the claim which was both brought before the WCAB and decided by the WCAB. The WCAB determined that it "lacked jurisdiction" only to award petitioner leave of absence pay. [ER 1103, 1107] The WCAB did, however, compensate petitioner for a "permanent disability," thus not only covering petitioner's emotional injuries from March to September 10, 1979, but also projecting that recovery into the future. Similarly, the emotional injury claim petitioner pursued in the district court was based upon his alleged injuries occurring during his employment with the Department up through September 10, 1979. In sum, contrary to petitioner's claims,

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8/ (...continued)
was the removal of his merit pay steps which occurred in the March to September 1979 time frame. This is the same time period for which petitioner sought and obtained full recovery for his permanent emotional distress injuries in the WCAB hearing.

the WCAB fully compensated him for his emotional injuries.

Petitioner's attempts to distinguish Migra, 465 U.S. 75, 104 S.Ct. 892, are entirely disingenuous. Like the plaintiff in Migra, petitioner herein sought and obtained recovery for conduct which allegedly occurred prior to his resignation, and the recovery took into consideration his continuing "permanent disability," thus compensating him for the period following his resignation. Likewise, the jury's award also considered petitioner's permanent emotional injuries, and compensated him therefor. Thus, as in Migra, petitioner was compensated for the entire period of his alleged injuries, and the Ninth Circuit properly recognized that he should not have been allowed to pursue a second recovery and obtain a second award for the same injury.

Second, petitioner erroneously argues that the WCAB did not consider the "merits" of petitioner's emotional distress claim. Indeed, the only issue which the WCAB did decide on the merits is the same issue for which petitioner sought emotional distress damages under Section 1983. Simply put, the WCAB determined whether petitioner suffered emotional distress and stress-related injuries as a result of his employment with respondent. That is precisely the "merits" of petitioner's claim for emotional distress under Section 1983.

Third, petitioner erroneously (and surprisingly) argues that he was not entitled to recover any emotional distress damages in his action before the WCAB. (See Petition, pp. 45-46) This ludicrous argument ignores the fact that petitioner sought an award, and the WCAB did, in fact, award petitioner damages

for his emotional and stress-related injuries. This argument also ignores the fact that petitioner has never tendered back his WCAB recovery to the City after suddenly discovering that he allegedly was "not entitled" to a WCAB recovery.

In sum, the Ninth Circuit correctly determined that under California law, petitioner's recovery before the WCAB barred his second recovery on the same claims for emotional distress injuries. Thus, petitioner misstates both the law and the facts when he argues that he "has been effectively left without any remedy at all for any emotional distress or injuries for the period commencing in May 1979 and thereafter." This is precisely the remedy that petitioner received from the WCAB.

## II.

## PETITIONER (1) MISSTATES THE LAW AND THE FACTS REGARDING THE SECONDARY ISSUE HEREIN BY ARGUING THAT RESPONDENT DID NOT PROPERLY RAISE THE DEFENSE OF PRECLUSION; AND (2) MISSTATES THE IMPORTANCE OF THE ISSUE

### A. RESPONDENT DID RAISE IN A PROPER AND TIMELY MANNER THE ISSUE OF THE PRECLUSIVE EFFECT OF PETITIONER'S PRIOR RECOVERY FOR THE SAME ALLEGED INJURY

Petitioner has both misstated the record and miscited authorities to argue that respondent did not timely raise the defense of preclusion.

#### 1. PETITIONER MISSTATES THE RECORD

First and foremost, respondent did raise the defense of preclusion before the damages phase of the trial, at which time the issue became ripe. Respondent asserted its position that petitioner was precluded from recovery in its pre-trial

"Brief re. Allowable Damages." [ER 1096-99; Appendix D.17] Thus, the district court was given an opportunity to rule upon the preclusion issue before the trial on damages, and petitioner has misstated the facts and attempted to mislead the Court by stating that respondent did not afford "the district court the opportunity to rule upon [the defense] prior to post-trial motions. . . ." (See Petition, p. 53).

Second, petitioner erroneously states that respondent "elected" to reduce petitioner's award in the district court by his WCAB recovery (apparently arguing that this alleged "election" amounted to a waiver of the preclusion defense). (See Petition, p. 53). Petitioner never raised this issue on appeal before the Ninth Circuit; accordingly, the alleged "election" likewise cannot be raised in this

Petition. Moreover, petitioner misstates the record. Contrary to petitioner's attempt to show that respondent abandoned its preclusion argument, respondent simply agreed to stipulate to an amount petitioner had earned for 1980 (which included the WCAB recovery [ER 1015]) in order to avoid a costly and time-consuming trial on damages; this stipulation was reached, however, only after the district court had rejected respondent's claim that petitioner's emotional distress recovery was entirely precluded. Respondent's stipulation was in no way an abandonment or waiver of its preclusion defense.

Third, petitioner fails to mention two key facts herein: (1) respondent could not raise the defense of the preclusive effect of the WCAB award when it filed its Answer in 1979 because the WCAB did not reach a decision until two

years later, and (2) because respondent raised the defense before the trial on damages, the defense was actually litigated at the damages phase of the trial. These two facts establish (as the Ninth Circuit determined) that respondent did raise the defense in a timely manner.

### 2. THE AUTHORITIES CITED ARE INAPPOSITE

Petitioner argues that the "Ninth Circuit has placed itself at odds with several other circuits" (emphasis added) and then proceeds to cite only two cases, both of which are distinguishable from the case at bar.

First, in Home Depot, Inc. v. Guste, 773 F.2d 616, 620-21 n.4 (5th Cir. 1985), the Court stated in a footnote that because the appellant had never raised the defense of preclusion, the court would not consider whether it was

applicable in that case. Respondent herein, on the other hand, did raise the defense and raised it before the trial on damages (when the issue became significant). [ER 1096-99; Appendix D.17] Moreover, Home Depot involved the preclusive effect of a recent Supreme Court decision, and not the preclusive effect of plaintiff's prior recovery, which was the issue decided herein. Thus, Home Depot is clearly distinguishable on its facts, and the holding is inapplicable herein.

Second, in State Farm Mutual Auto Ins. Co. v. Mid-Continent Casualty Co., 518 F.2d 292, 296 (10th Cir. 1975), the preclusive effect of a prior judgment was not even an issue. Rather, at issue in State Farm was the defense of estoppel under a particular rule of insurance law. Moreover, in State Farm, the defense was not raised at trial, whereas respondent

herein did raise the issue at the damages phase of the trial.

Finally, petitioner miscites two inapplicable Ninth Circuit decisions to argue erroneously that the decision herein is "at odds" with other Ninth Circuit decisions. Contrary to petitioner's assertion, United States v. First Nat. Bank of Circle, 652 F.2d 882, 886-87 (9th Cir. 1981) did not hold that a theory which was not included in a pre-trial order could never be tried. Rather, in First Nat. Bank, the court merely accepted the respondent's argument that the theory both was not included in the pre-trial order and contradicted the facts stated in the pre-trial order. Id. The Court also stated, however, that pre-trial orders should be liberally construed. Id. The preclusion defense herein, however, did not contradict the facts of any pre-trial order -- although

not mentioned in the pre-trial order, it was undisputed that petitioner had sought and gained recovery before the WCAB.

Likewise, Wood v. Sunn, 865 F.2d 982, 987 (9th Cir. 1988) is inapplicable. Unlike defendant in that case, respondent herein did present the defense to the district court before the trial on damages, whereas the holding in Wood v. Sunn was based on the failure to raise the defense before trial.

Thus, for the above reasons, as well as petitioner's mischaracterization of the record and authorities, the Court should deny the Petition on the second question presented.

### B. THE ALLEGED FAILURE TO TIMELY RAISE THE DEFENSE OF PRECLUSION IS NOT AN "IMPORTANT ISSUE" DESERVING OF A WRIT OF CERTIORARI

"A petition for writ of certiorari will be granted only when there are special and important reasons therefor." Rules of the United States Supreme Court, Rule 10.

Respondent's alleged failure to timely raise the preclusion defense, a contention which the Ninth Circuit rejected, is not the sort of "special and important" issue that needs resolution by the United States Supreme Court. Moreover, as explained above, petitioner has exercised license with the legal authorities cited above in a misguided attempt to show that a "conflict" exists among the circuit courts, and that this is an issue worthy of Supreme Court review. Likewise, petitioner has attempted to

manufacture an important issue by mischaracterizing the Ninth Circuit's decision herein as a "rule," when in fact, the Ninth Circuit recognized the general rule that preclusion must be pleaded, but also determined that the specific circumstances of this case warranted an exception to that rule. [Appendix D.17] This is just another example of petitioner's unwillingness to accept any adverse ruling without multiple challenges.

In short, this is not the sort of question which this Court should spend its limited and valuable time and resources deciding.

## III.

**PETITIONER'S THIRD QUESTION PRESENTED IS MOOT DUE TO THE NINTH CIRCUIT'S RECENT DECISION ON REHEARING OF THE COMPANION CASE OF SANCHEZ V. CITY OF SANTA ANA**

Shortly after petitioner filed this Petition for Writ of Certiorari, the Ninth Circuit on rehearing in Sanchez II awarded petitioner the requested attorney's fees. [Appendix O] Accordingly, the third question presented herein is now moot.

## CONCLUSION

In sum, petitioner asks this Court to give him a "second bite at the apple" by reversing the Ninth Circuit's determination that petitioner's recovery before the WCAB bars a second recovery for the same injury. Moreover, peti-

tioner misstates the basis of the decision below and asks this Court to reopen an issue which was settled five years ago with this Court's decision in University of Tennessee v. Elliott. For the reasons set forth above, respondent respectfully requests that the Court deny this Petition for Writ of Certiorari.

DATED: June 23, 1991

Respectfully submitted,

CHARLES W. MATHEIS, JR.
BEAM & BROBECK

By:_____
Charles W. Matheis, Jr.

Attorneys for Respondent
City of Santa Ana

# APPENDIX M

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| LEAGUE OF UNITED LATIN AMERICAN CITIZENS, LAWRENCE FELIX, NARCISO ARCE, and EFREN LOZANO, Individually, and on behalf of all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>THE CITY OF SANTA ANA, A Municipal Corporation, JERRY M. PATTERSON, in his official capacity as Mayor of the City of Santa Ana, BRUCE C. SPRAGG, in his official capacity as City Manager of the City of Santa Ana, DONALD BOTT, in his official capacity as Fire Chief of the City of Santa Ana, and RAYMOND C. DAVIS, in his official capacity as Police Chief of the City of Santa Ana,<br><br>Defendants. | C.A. NO. CV 74-767-F<br><br>SECOND CONSENT DECREE AND FINAL JUDGMENT |

Plaintiffs filed a complaint herein on March 23, 1974, alleging that defendants have engaged in employment

discrimination based on race and national origin. A trial has been held herein resulting in a decision and opinion reported at 410 F.Supp. 873, supplemented by a subsequent decision reported at 13 FEP Cases 1019, 13 E.P.D. ¶11,308. An interlocutory appeal taken by the defendants has been dismissed by the Ninth Circuit Court of Appeals by order dated September 28, 1977.

By a consent decree entitled "Consent Decree in Partial Settlement of Action," entered on December 16, 1977, most, but not all issues in this lawsuit were settled. The instant Second Consent Decree constitutes a settlement of all remaining issues between the parties at the District Court level. Defendant, however, reserves the right to appeal a single ruling.

The defendants enter into the instant consent decree without admitting

liability of the validity of any of plaintiffs' claims. This decree is entered into as a partial settlement of an existing dispute, and defendants do not admit that there is or has been any violation of any law, rule, or regulation. Nothing herein shall require the employment, promotion or selection of less qualified persons over more qualified persons as determined by valid selection criteria, nor require employment of persons who do not meet valid qualification standards, nor require displacement of incumbent employees or hiring of unneeded employees.

Declarations by counsel filed herein show that notice to class members of the instant decree has been carried out. No objections to the settlement have been made.

On December 20, 1974, Lawrence Felix was certified as class representative. The represented class herein is as follows:

> "(a) all Mexican-Americans who have applied for employment as police officers or firefighters with the defendant City of Santa Ana within three years of the commencement of this action; (b) all Mexican-Americans who presently are applicants for such employment; and (c) all Mexican-Americans who may apply for such employment in the future, who apply during the effective term of any final decree this Court may issue . . ."

The term "Mexican-American" as used in this Consent Decree shall be interpreted to mean any person who has a "Spanish surname" or is "Spanish language" as those terms are utilized by

the United States Department of Commerce, Bureau of the Census, in the 1970 United States Census.

The Court has reviewed this Second Consent Decree and Final Judgment of Lawsuit and the Declaration of Plaintiffs' counsel submitted concurrently herewith and has determined that the provisions herein are fair and reasonable to all parties and the represented class.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs shall seek no back pay claims for class members Peter Jimenez, Mike Alvarez, and John Sierra. Defendants shall offer firefighter positions to these three class members, as vacancies occur, provided the above-named three class members successfully

complete the remaining portions of the selection process, i.e., the medical examination and background check.

2. Defendants may appeal only this Court's ruling on the issue of whether the "Form 45" Fire Aptitude Test has been shown to be job-related or validated according to the requirements of the law. Neither plaintiffs nor defendants shall appeal any other issue, including the issue of whether the "Form 45" test had an adverse impact upon Mexican-American applicants.

3. Plaintiff Felix shall receive $500 in full and complete satisfaction of all claims he may have against defendants.

4. This District Court already has ruled at pages 74 and 75 of the

Memorandum Opinion, filed March 12, 1976, that a hiring order shall be entered herein for both police officer and firefighter positions. The Court, however, left to future proceedings, or to Court-approved stipulation of the parties, a determination of the extent and duration of that hiring order. By stipulation the hiring orders shall be as follows:

a. No hiring order shall be entered for police officer positions;

b. During any calendar year, defendants shall engage in good faith efforts to insure that no less than approximately

30% of all new appointees into firefighter positions shall be Mexican-Americans until such time as 23% of the entire uniformed workforce in the Santa Ana Fire Department is Mexican-American;

5. Defendants shall file an annual report with the Court, and serve a copy upon plaintiffs' attorneys, on the second Monday in January of each year that the hiring order remains in effect, beginning January, 1980. The report shall set forth:

a. The total number of persons hired into

the Santa Ana Fire Department during the immediately preceding calendar year;

b. The total number of Mexican-Americans hired into the Fire Department during the immediately preceding calendar year;

c. The total number of uniformed employees in the Fire Department as of the date of the report; and

d. The total number of uniformed employees in the Fire Department who are Mexican-American as

of the date of the report.

6. Plaintiffs shall take no action concerning a breach of the provisions of Paragraph 5 absent giving defendants thirty days notice and opportunity to cure the breach.

7. The Court shall retain jurisdiction of this lawsuit and this Consent Decree shall remain in force and effect until dissolved. Once the percentage of Mexican-Americans in the entire uniformed workforce in the Santa Ana Fire Department reaches 23%, the Court shall, upon the motion of defendants, or any of them, and with no further cause shown, order this Consent Decree dissolved.

8. The back pay and other relief to be received by all identifiable class members, other than Plaintiff Felix and the class members mentioned in paragraph one above, shall be as set forth on the attached Appendix "A".

9. Paragraph 10 of the first Partial Consent Decree provided that plaintiffs' counsel could seek an additional costs and fees award for work done at the District Court level subsequent to entry of the first Partial Consent Decree. That paragraph 10 also provided that Plaintiffs' counsel could seek an additional costs and fees award for work to be done on any appeal on the condition that plaintiffs were the

prevailing party on the appeal. Paragraph 10 of the prior Consent Decree shall be modified as follows:

a. A. Thomas Hunt and the other attorneys employed by the Center for Law in the Public Interest shall reduce their claim of approximately $3,000 for costs and attorneys' fees for all time expended on this case after entry of the first Partial Consent Decree on December 16, 1977, and before entry of the instant Consent Decree, to a sum of $1,000.

b. Walter Cochran-Bond shall reduce his claim of approximately $10,000 for costs and attorneys' fees for time expended on this case after entry of the first Partial Consent Decree on December 16, 1977, and before entry of the instant Second Partial Consent Decree, to a sum of $6,500.

c. If defendants succeed on any appeal of the "Form 45" validation issue, plaintiffs' counsel shall receive no costs or fees for

work done on the appeal. If plaintiffs, however, prevail on the appeal, plaintiffs' counsel shall be entitled to a costs and fees award, provided that plaintiffs' counsel shall not seek more than $5,000 for their costs and fees for work done on the appeal. This $5,000 limitation shall not be applicable should this case be accepted for review by the United States Supreme Court.

APPENDIX M.14

DATED: November , 1978

_____
WARREN J. FERGUSON
United States District Judge

CONSENTED TO:

A. THOMAS HUNT
TIMOTHY B. FLYNN
Center for Law in the Public Interest

WALTER COCHRAN-BOND

PAUL BRYAN GRAY

By_____
A. THOMAS HUNT

Attorneys for Plaintiffs

KEITH L. GOW, City Attorney
EDWARD J. COOPER, Assistant City Atorney
CARRIE MACMILLAN, Deputy City Attorney

By_____
CARRIE MACMILLIN

Attorneys for Defendants

**RELIEF OBTAINED BY IDENTIFIABLE MEMBERS OF THE PLAINTIFF CLASS**

Michael Alvarez - potential job offer

Narciso Arce - job offer - appointed January, 1977; backpay - $7,950.31

John Delgado - backpay - $12,803.37

Ernest Hernandez - job offer - declined, employed as firefighter by City of Chula Vista; backpay - $8,853.50

Peter Jiminez - potential job offer

Efren Lozano - job offer - appointed January, 1977; backpay - $8,513.47

Andrew Montoya - backpay - $10,539.11

Richard Rodriguez - backpay - $3,969.50

John Sierra - potential job offer

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.<br><br>Plaintiff(s)<br><br>vs.<br><br>CITY OF SANTA ANA, et al.<br><br>Defendant(s) | CASE NUMBER<br>CV 74-767-F<br><br>NOTICE OF ENTRY |

TO THE ABOVE NAMED PARTIES AND TO THEIR ATORNEY(S) OF RECORD:

You are hereby notified that a second consent decree & final judgment _____ _____ _____ in the above entitled case was entered in the docket on November 7, 1978.

You are also notified that if this case was tried and you introduced

exhibits into evidence, they must be claimed at this office after the expiration of thirty days from the receipt of this notice. (After sixty days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

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CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on November 7, 1978, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Paul B. Gray
1042 West Santa Ana Blvd., Ste. C
Santa Ana, CA 92703

Theodore A. Johnson
401 Civic Center Dr., West
Suite 570
P.O. Box 324
Santa Ana, CA 92702

Frank J. Fekete
Deputy City Attorney
20 Civic Center Plaza
Santa Ana, CA

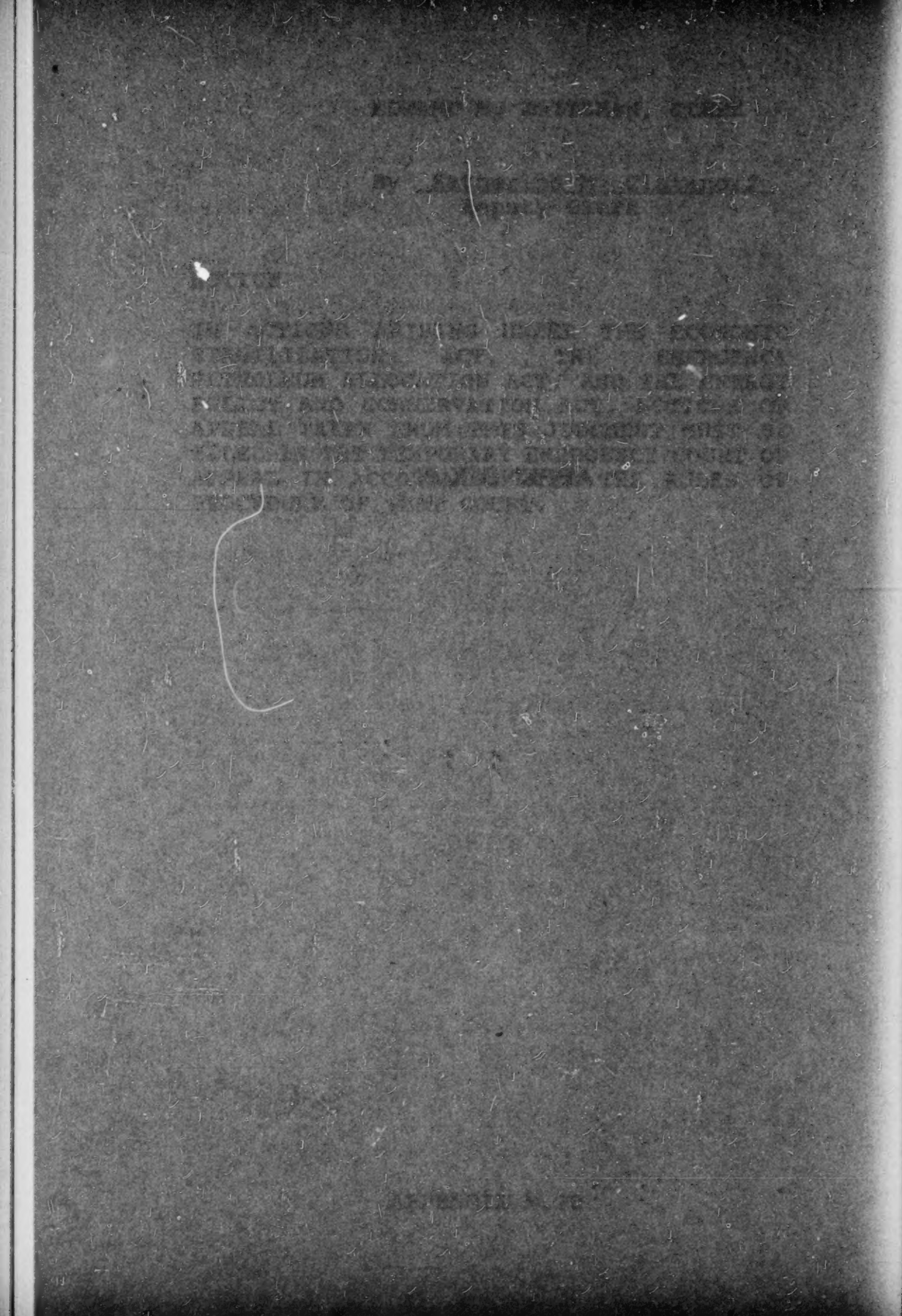
EDWARD M. KRITZMAN, CLERK

By Katherine M. Clatanoff
Deputy Clerk

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEAL IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

# APPENDIX N



# CALIFORNIA LABOR CODE SECTION 4850

**§ 4850. Law enforcement officers, firefighters and lifeguards; leave of absence with salary in lieu of temporary disability payments; duration of section.**

Whenever any city policeman, harbor policeman of any harbor district, city, county, or district firefighter, sheriff or any officer or employee of a sheriff's office, any inspector, investigator, detective, or personnel with comparable title in any district attorney's office, or lifeguard employed year round on a regular, full-time basis by a county of the first class, who is a member of the Public Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code) is disabled, whether temporarily or permanently, by injury or

illness arising out of and in the course of his or her duties, he or she shall become entitled, regardless of his or her period of service with the city or county, or district, to leave of absence while so disabled without loss of salary in lieu of temporary disability payments, if any, which would be payable under this chapter, for the period of the disability, but not exceeding one year, or until such earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments, or advanced disability pension payments pursuant to Section 4850.3 of the Labor Code. This section shall apply only to city policemen, harbor district policemen, sheriffs, or any officer or employee of a sheriff's office, and any inspector, investigator, detective, or personnel with comparable title in any district

attorney's office, who are members of the Public Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code) and excludes employees of a police department whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active law enforcement service, and excludes employees of a county sheriff's office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service. It shall also apply to city, county, or district firefighters who are members of the Public Employees'

Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code) and excludes employees of the city fire department, county fire department, and of any fire district whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active firefighting and prevention service. It shall also apply to deputy sheriffs subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Codes). It shall also apply to lifeguards employed year round on a regular, full-time basis by counties of the first class who are subject to the

County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code). If the employer is insured, the payments which, except for the provisions of this section, the insurer would be obligated to make as disability indemnity to the injured, the insurer may pay to the insured.

This section shall remain in effect only until January 1, 1990, and as of that date is repealed, unless a later enacted statute, which is chaptered before January 1, 1990, deletes or extends that date.

# APPENDIX O

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

JESSE J. SANCHEZ; VICTOR TORRES; ROBERT CARO,
*Plaintiffs-Appellants,*

v.

CITY OF SANTA ANA; CITY OF SANTA ANA POLICE DEPARTMENT; DON BOTTS; RAYMOND C. DAVIS; E. B. HANSEN; ROBERT STEBBENS; NORWOOD WILLIAMS; LEE DRUMMOND; LAWRENCE PITZER; MICHAEL LEWELLEN; DALE STERZER; GARY DIXON; JOHN COLLINS; JOHN MCDANIELS; MICHAEL LANNERS; WILLIAM BRUNS; JOHN DITTUS; RICHARD FAUST; JOHN MCCLAIN,
*Defendants-Appellees.*

Nos. 85-6504; 86-6226, 87-5614, 88-5853

D.C. No. CV-79-1818-KN

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding*

Argued and Submitted
December 4, 1989—Pasadena, California

Filed July 11, 1990
Amended May 24, 1991

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Diarmuid F. O'Scannlain,
Circuit Judges.

*Judge Irving Hill, District Judge for the Central District of California, presided over many of the pretrial orders.

## COUNSEL

Meir J. Westreich, Glendale, California, for the plaintiffs-appellants.

Charles Matheis, Jr., Santa Ana, California; Larry J. Roberts, Orange, California; Daniel F. Fears, Paul, Hastings, Janofsky & Walker, Costa Mesa, California, for the defendants-appellees.

## ORDER

The order and amended opinion filed February 27, 1991 is amended as follows:

Slip op. at 2216, line 7, following "fees": insert a comma after the word "fees" and then insert "including fees on appeal,"

Slip op. at 2216, line 9, following "(9th Cir. 1990).": insert: "The district court shall determine the amount of fees that can be attributed to the part of Sanchez's appeal that was successful, and shall award reasonable attorney's fees and costs to the extent of Sanchez's success, both for the work in the district court and on appeal."

Slip op. at 2216, 1st full paragraph: delete: "The parties will bear their own costs of appeal."

With these amendments the petition for rehearing is denied. Judges Schroeder and O'Scannlain have voted to reject the suggestion for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Plaintiff's request for an extension of time within which to file a motion for attorneys' fees is now moot. This order has resolved the issue of attorneys' fees.

The mandate in this case is stayed for 90 days to permit the preparation and filing of a petition to the Supreme Court.

## OPINION

GOODWIN, Chief Judge:

Jesse J. Sanchez, Victor Torres, and Robert Caro, former police officers of the Santa Ana Police Department (SAPD), appeal district court judgments in their action against the City of Santa Ana, and various Police Captains, Lieutenants and Sergeants for alleged deprivation of rights secured by the first and fourteenth amendments, in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and alleged employment discrimination by the City of Santa Ana in violation of 42 U.S.C. §§ 1981, 1983, 2000e-2(a). The City of Santa Ana also appeals. That appeal is addressed in *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990) (Nos. 86-6386, 88-5827, 88-5855).

Between 1975 and 1978, the number of Hispanic police officers at the SAPD greatly increased as a result of a Bilingual Lateral Transfer Program designed to encourage Spanish-speaking officers from other California police departments to transfer to the SAPD. *See generally League of United Latin Am. Citizens (LULAC) v. City of Santa Ana*, 410 F. Supp. 873 (C.D. Cal. 1976) (finding SAPD hiring practices unconstitutional and instituting a hiring order to remedy past practices of discriminatory hiring).

In November 1977, 100 of 225 SAPD officers took a written examination to become Sergeant. Following the examina-

tion, the City Personnel Department proposed that the passing score be adjusted to enable more Hispanic officers to pass the written examination and become eligible to compete in the oral examination for the position of Sergeant. The chief of police did not support the proposal. It was not implemented.

In December 1978, Sanchez, who was hired pursuant to the Bilingual Lateral Transfer Program, observed on the roll call board a cartoon he considered to be racially offensive. Sanchez took a copy of the cartoon to the City Personnel Department. The police chief punished those involved in disseminating the cartoon. Sanchez also received an official reprimand for violating the chain of command by bringing the cartoon to the attention of the City Personnel Department, rather than the proper SAPD officials.

On January 9, 1978, Sanchez, Caro and Torres, together with other members of the SAPD, chartered an Orange County chapter of the Latino Peace Officers Association (LPOA), with Caro as president and Torres as vice-president. At a January 13, 1978 meeting between Chief Davis and minority officers, Caro, on behalf of the LPOA, presented Chief Davis with a packet of materials detailing racial problems within the SAPD (the "LPOA Packet"). Pursuant to Chief of Police Davis's instructions, Lieutenant Salazar and Lieutenant Lewellen were assigned to investigate the allegations as well as the cartoon incident. The lieutenants prepared a report for Chief Davis. The report found no racial problems, noted some isolated incidents of offensive language, and characterized some minority officers as "super-sensitive."

According to the plaintiffs, LPOA members during the next few months, became targets of selective enforcement of SAPD rules and of peer ostracism. They also claim that various defendants made racially offensive slurs. The complaints alleged that LPOA members resigned from the organization because of their fears of ostracism and discrimination by defendants. Plaintiffs also alleged that unsafe vehicles were

assigned to LPOA members and that they did not receive adequate police back-ups during certain operations. Sanchez and Torres claim that secret and illegal personnel files were kept on them by various defendant-supervisors.

On January 13, 1978, Caro complained to Lieutenant Williams, his supervisor, that Bannon, an Anglo officer, used unnecessary force during an arrest. The allegations prompted an investigation by Bannon's supervisor, Lieutenant Dixon, but no charges resulted. Caro complained to Lieutenants Williams and Jordan, Sergeants Dittus, and Garza (the Affirmative Action Officer), that Dixon was biased.

Following the investigation, Chief Davis terminated Caro's employment on the ground that his allegation against Bannon was unfounded and made with evil intent. The termination statement also said that Caro was untruthful during the subsequent investigation. Despite Caro's contention that the investigation was biased and hostile to him, due to his involvement with the LPOA, the termination was upheld by the Santa Ana Personnel Board, the California Superior Court, and the California Court of Appeals.

Following Caro's discharge, Torres made a public statement regarding continued discrimination at the SAPD. Although he was not formally reprimanded, Torres was reminded of his duty to present discrimination claims within the SAPD before airing his grievances to the public.

In January of 1978, Torres applied for the position of Assistant Team Leader (ATL) for the patrol division, and, based on his 1977 test scores, he was next in line for the position. The list expired, however, and in March of 1978, Torres submitted his application to an ATL oral board (Lieutenants Lewellen and Sterzer and Sergeant Bruns). Torres testified that he was questioned about and orally reprimanded for his involvement with the LPOA and the LPOA Packet. Torres never became an ATL.

APPENDIX O.6

In September of 1978, Torres requested a leave of absence to attend to his ill parents. His request was denied. Torres then appealed and was granted a one-week leave. At the end of the week he voluntarily resigned from the SAPD. In an April, 1979 letter to Personnel Director Botts, Torres stated that he resigned to assist his parents. Torres now claims, however, that he was constructively discharged as a result of racial discrimination.

In March of 1979, Sanchez also resigned from the SAPD. He claims that he was constructively discharged following the removal of his merit pay. *See Sanchez*, slip op. at _.

On May 18, 1979, Sanchez, Torres and Caro filed a complaint seeking damages and injunctive relief for violations of their civil rights.[1] Plaintiffs moved for full discovery of SAPD personnel files and the defendants sought a protective order to limit plaintiffs' discovery. The court granted the protective order in part, limiting plaintiffs' discovery to (1) statistical data, compiled by the SAPD, regarding the number of full-time, permanent members of the SAPD who were discharged or who resigned while under investigation, between February 1973 and July 1979 and (2) comparative data regarding the compensation of members of the SAPD between May 1975 and July 1979, with no identification of individual members beyond ethnic and sex classifications. The court's grant of the protective order was without prejudice to the plaintiffs' moving for production of the protected material if the action were certified as a class action. The plaintiffs thereafter moved for class certification on behalf of all Hispanic officers, pursuant

[1]On June 13, 1978, Sanchez filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission (EEOC). On May 17, 1978, Torres filed a similar charge with the EEOC. On March 7, 1978, Caro also filed a charge with the EEOC. Plaintiffs received a right-to-sue letter from the U.S. Department of Justice on April 11, 1979 and timely instituted this civil action in federal district court on May 18, 1979. *See* 42 U.S.C. § 2000e.

to Fed. R. Civ. P. 23(b)(1), (b)(2), which the district court denied on February 26, 1980.

Defendants moved to dismiss or in the alternative for summary judgment or partial summary judgment. Partial summary judgment was granted to defendants as to (1) all issues concerning defendants' hiring practices; (2) Sanchez's complaints based on his failure to get Crime Scene Investigator pay; (3) Torres's claim of discrimination for failure to promote him to Sergeant; and (4) all generalized claims of a disparate impact from disciplinary proceedings being more frequent towards Hispanics than others. Defendants were also granted partial summary judgment as to all of Caro's pre-termination claims. Caro's pre-termination claims were precluded by his state proceedings, but Caro's post-termination claims were preserved.

Sanchez was granted summary judgment against the City of Santa Ana on his claim of denial of due process in removal of his merit pay, but was denied summary judgment on his first amendment discriminatory retaliation claim. Following thirty-nine days of trial, a verdict was directed in favor of the defendants on all remaining claims. The court, as noted in the companion appeal, referred Sanchez's claims for damages to the jury.

The City moved for judgment notwithstanding the verdict or for a new trial and both motions were denied. The defendants' motions for attorney's fees were granted and defendants were awarded $471,558.71. Sanchez's motion for determination of prevailing party status was granted on his due process claim but denied on his other claims; he was denied attorney's fees and costs.

## JURISDICTION

All but five of the defendants[2] contend that this court lacks

[2]Defendants Collins, Dittus, Faust, Lanner and McDaniel.

jurisdiction over this appeal because the district court improperly vacated Fed. R. Civ. P. 54(b) certification of the final directed verdict judgments, and the plaintiffs did not timely appeal from the certified judgment. We reject this contention.[3]

In directing a verdict on most of the plaintiffs' claims, the district court ordered the defendants to prepare a judgment in conformance with the directed verdict. There is no indication in this order that the court directed the judgment to be certified under Fed. R. Civ. P. 54(b).[4]

On December 4, 1985, the defendants filed a proposed judgment reciting that there was no just reason for delay, and directing that judgment be entered forthwith pursuant to Rule 54(b). The district court entered the judgment and served it on all the parties. It is undisputed that the plaintiffs failed to file a notice of appeal within thirty days of this judgment, as required by Fed. R. App. P. 4.

At a hearing on February 24, 1986, the plaintiffs argued that the December 5, 1985 judgment was not appealable because the district court had not intended to certify the judgment under Rule 54(b). The plaintiffs reminded the court that on December 9, 1985, four days after entry of judgment, the court had indicated that it intended there be only a single, final judgment from the case. At a March 10, 1986 hearing on

[3]A motions panel of this court has previously ruled that this court has jurisdiction over the plaintiffs' appeal. While this court gives deference to motions panel decisions made in the course of the same appeal, we have an independent duty to decide whether we have jurisdiction. *See Schlegel v. Bebout*, 841 F.2d 937, 941 (9th Cir. 1988).

[4]Rule 54(b) provides in part: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

the plaintiffs' motion to correct the judgment, the court stated that it never intended to certify the judgment under Rule 54(b) and vacated the 54(b) certification.

Fed. R. Civ. P. 60(a) provides that clerical mistakes in judgments arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. "The error can be corrected whether it is made by a clerk or by the judge." *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir. 1987).

In deciding whether the district court may alter a judgment pursuant to Rule 60(a), our focus is on what the court originally intended to do. *Id.* Rule 60(a) is limited, however, to correcting errors "arising from omission" and may not be used to correct more substantial errors, such as errors of law. *Waggoner v. R. McGray, Inc.*, 743 F.2d 643, 644 (9th Cir. 1984) (per curiam).

The situation here falls under Rule 60(a). The district judge stated on the record that he never intended to grant 54(b) certification. We find no reason to doubt the district judge's statements, particularly in light of his failure to direct the defendants to include 54(b) certification in the final judgment he asked them to prepare. *See Blanton*, 813 F.2d at 1577. Accordingly, the error arose from oversight or omission and was within the district court's power to correct under 60(a). *See Waggoner*, 743 F.2d at 644.[5]

[5]The defendants contend that the district court did not have the authority to correct the judgment under Rule 60(a) because the rule may not be used to correct substantial errors. By "substantial" errors, the court means non-clerical errors; it is not referring to the magnitude of the error. *Waggoner*, 743 F.2d at 644-45. Because the district court's error was clerical, it was within the district court's power to correct the judgment under 60(a).

## PROTECTIVE ORDER

[1] Plaintiffs claim that the district judge improperly issued a protective order denying them discovery of SAPD personnel files and allowing limited discovery of SAPD compiled statistical data. Defendants correctly argue that the protective order was proper because of the confidential nature of the requested files.

[2] Federal Rule of Civil Procedure 26(c) provides that a court may limit discovery to protect from annoyance, embarrassment, oppression, or undue burden or expense. Federal common law recognizes a qualified privilege for official information. *Kerr v. United States Dist. Ct. for N.D. Cal.*, 511 F.2d 192, 198 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976). Government personnel files are considered official information. *See, e.g., Zaustinsky v. University of Cal.*, 96 F.R.D. 622, 625 (N.D. Cal. 1983), *aff'd*, 782 F.2d 1055 (9th Cir. 1985). To determine whether the information sought is privileged, courts must weigh the potential benefits of disclosure against the potential disadvantages. If the latter is greater, the privilege bars discovery. *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, 1384-85 (5th Cir. 1980); *Zaustinsky*, 96 F.R.D. at 625.

The relevance of plaintiffs' discovery request for employment data is undisputed. Most of the relevant information, however, could have been developed by interrogatories. It is well-settled that an employee may prove his or her claim of unlawful discrimination by evidence that other employees of different races or national origin were treated differently in similar circumstances. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1362-63 (9th Cir. 1985). Statistical evidence alone may make out a prima facie case of unlawful discrimination. *Wards Cove Packing Co., Inc. v. Antonio*, _ U.S. _, 109 S. Ct. 2115, 2121 (1989).

Plaintiffs seek more than statistical data of officer employment termination, discipline and compensation. They demanded access to the SAPD's personnel files to compile their own statistics. While these files are not absolutely privileged, the confidential nature of the employee personnel files suggests that opening the files to the plaintiffs for a general search could reach well beyond the legitimate inquiries necessary to this litigation and would impact disciplinary procedures within the SAPD. The SAPD claims that the files contain additional confidential information that is irrelevant to plaintiffs' suit.

[3] The district court did not abuse its discretion in denying access to these files. *See Ah Moo v. A.G. Becker Paribas, Inc.*, 857 F.2d 615, 619 (9th Cir. 1988). While plaintiffs demonstrate the relevance of statistics to their suit, they fail to show that discovery of the actual files was necessary. Focused discovery could have been employed. Plaintiffs accuse the defendants of inaccurate statistical conclusions, but they were free to utilize the statistics to draw their own conclusions. In addition, the plaintiffs had access to the same EEOC data from which the SAPD's expert compiled the statistics in question, and, when investigating a charge, the EEOC has "a broad right of access to relevant evidence." *University of Pa., Petitioner v. Equal Employment Opportunity Commission*, _ U.S. _, 110 S. Ct. 577, 583 (1990) (citing 42 U.S.C. § 2000e-8(a)). The SAPD's expert did not draw conclusions from the files themselves but from the EEOC data. Plaintiffs have not alleged that the EEOC data is biased or that they were denied access to this data. They fail to show prejudice from the denial of their full discovery request.

## SUMMARY JUDGMENT ON PAY AND PROMOTION CLAIMS

[4] Plaintiffs claim that the SAPD's promotion policies, which require officers to be employed by the SAPD for a certain period of time before they can be eligible for promotions,

have a discriminatory impact on Hispanic officers hired laterally from other police departments.[6] Plaintiffs challenge the district court's finding that these pay and promotion claims were governed by *LULAC*, 410 F. Supp. 873 (C.D. Cal. 1976). We agree that the district court misapplied *LULAC*.

[5] In *LULAC* the district court held that the City of Santa Ana engaged in discriminatory hiring practices that resulted in disproportionally few Mexican-American police or firemen. 410 F. Supp. at 911-12. The suit was brought in 1974 by a rejected Hispanic police applicant and by the League of United Latin American Citizens on behalf of its members. Finding unlawful discrimination, the district court also mandated that a preferential hiring order be instituted in future proceedings. *Id.* at 911. The district court in the instant case held that *LULAC* governed "all aspects of *lateral* transfers including credits, salary and classification." (emphasis added). *LULAC*, however, makes no mention of the City's policies on lateral hiring or potential discrimination that may result from those policies. *LULAC* only addresses hiring policies for new applicants to the police force. Moreover, the bilingual lateral transfer program began in 1974-75 following the initiation of the *LULAC* suit. Because the district court erroneously applied *LULAC* we reverse the district court's grant of summary judgment on this issue and remand for consideration of the plaintiffs' claim.

## SUMMARY JUDGMENT ON OTHER DISPARATE IMPACT CLAIMS

Plaintiffs alleged that the defendants enforced City and department regulations in a racially and ethnically discriminatory fashion. On the basis of the defendants' statistical data, which did not reveal any discrimination, the district court

[6]Officers hired laterally from other police departments enter as "step C" employees as compared to rookie police officers who enter at "step A." Advancement to steps D and E is based on merit.

granted summary judgment to defendants on all generalized claims of disparate impact from disciplinary proceedings.

On appeal, plaintiffs challenge this summary judgment because they were denied equal access to personnel files which they claim would have allowed them to compile contradictory statistics and challenge defendants' evidence. As discussed previously, this claim has no merit.

## DENIAL OF CLASS CERTIFICATION

[6] Sanchez, Torres, and Caro brought this action as individuals and as a class on behalf of all Spanish-surnamed individuals employed by the City as police officers, past, present and future, pursuant to Fed. R. Civ. P. 23(a), (b)(1), (b)(2). The district court denied class certification primarily upon a finding that the three no-longer-employed plaintiffs failed to meet the commonality and typicality requirements of Fed R. Civ. P. 23(a)(2) & (3). This ruling is correct.

On appeal plaintiffs argue that the denial of equal access to the personnel files prevented them from specifically alleging commonality or typicality. As previously noted, this claim has no merit and the district court did not abuse its discretion in refusing to certify this class. *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), *cert. denied*, _ U.S. _, 110 S. Ct. 69 (1989); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 779 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986).

## CARO'S PRE-TERMINATION CLAIMS

[7] Caro claims that the district court erred in granting summary judgment to defendants on his pre-termination claims based on a finding that the claims were barred by res judicata. We affirm the district court.

Following Caro's termination from the SAPD, he appealed the dismissal to the Personnel Board of the City of Santa Ana

seeking a reversal and reinstatement. The Personnel Board denied his requests, and Caro instituted an action in the California Superior Court seeking the same relief. He lost in the Superior Court and appealed to the Court of Appeals where he also lost. The Court of Appeals specifically found that Caro was afforded a full and fair hearing at the Personnel Board and that there was no bias or prejudice, racial or otherwise, involved in, or causing his discharge. The court also held that there were no due process violations. In response to the res judicata defense in the district court, Caro argued that the defendants conspired to obstruct justice and deter witnesses who might have testified on his behalf in violation of 42 U.S.C. § 1985(2).

It is well-established that where a federal constitutional claim is based on the same asserted wrong as a state action and the parties are the same, res judicata will bar the federal constitutional claim, whether or not it was asserted specifically in state court. 28 U.S.C. § 1738 (1982); *Trujillo v. County of Santa Clara*, 775 F.2d 1359, 1363 (9th Cir. 1985); *Scoggin v. Schrunk*, 522 F.2d 436, 437 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

[8] In California, to whose law we must look for the applicable res judicata and collateral estoppel principles, *Punton v. City of Seattle*, 805 F.2d 1378, 1380 (9th Cir. 1988), *cert. denied*, 481 U.S. 1029 (1989), res judicata precludes a plaintiff from litigating a claim if the claim "relates to the same 'primary right' as a claim in a prior action, the prior judgment was final and on the merits, and the plaintiff was a party or in privity with the party in the prior action." *Trujillo*, 775 F.2d at 1366, (citing *Slater v. Blackwood*, 15 Cal.3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (Cal. 1975)). Caro's claim was based upon the same due process rights, the state court judgment was final, and he was a party to the action. Moreover, he could have raised the specific allegation of conspiracy to obstruct justice in his state court proceedings.

Caro argues that he was not afforded a full and fair opportunity to litigate the claim in the state court and, accordingly, he should not be barred from litigating his pre-termination claims in federal court. We reject this contention.

Collateral estoppel does not apply when the party against whom it is asserted did not have a "full and fair opportunity" to present the case. *Kremer v. Chemical Constr.*, 456 U.S. 461, 480-81 (1982); *Allen v. McCurry*, 449 U.S. 90, 95 (1980). The Supreme Court has stated, however, that "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481. Caro claims that Community Service Officer Christine Schuller was intimidated by various defendants and as a result would not testify on his behalf. He failed, however, to produce proof of that assertion. Moreover, Caro does not claim, and we do not find, that the California courts violated minimum standards of due process.

Caro also contends that issue and claim preclusion should not apply to claims brought under 42 U.S.C. § 1985(2). While the Supreme Court has not stated specifically that claim and issue preclusion principles apply to section 1985(2) conspiracy claims, it has held these principles applicable to Title VII and section 1983 suits. *See Migra v. Warren City School Dist. Bd of Ed.*, 465 U.S. 75 (1984) (state preclusion law applies to section 1983 claims); *Kremer*, 456 U.S. at 461 (claim and issue preclusion apply to Title VII actions). Moreover, in *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd, Kush v. Rutledge*, 460 U.S. 719 (1983) we afforded full faith and credit to state judicial proceedings involving an athlete's claim that he was assaulted by his coach and that the team engaged in a cover-up of the incident in violation of section 1985(2). Likewise, we conclude that Caro's claim that justice was obstructed during the Personnel Board and state court proceedings is barred.

## DIRECTED VERDICTS

Following the completion of the plaintiffs' oral presentation of evidence, defendants were granted directed verdicts on all remaining claims. Plaintiffs appeal the verdicts on the following claims: (1) The existence of a racially discriminatory atmosphere; (2) The unlawful retaliation against the plaintiffs for engaging in protected speech; (3) The discrimination and retaliation based on race and national origin; and (4) The conspiracies against plaintiffs due to their exercise of first amendment rights, their race and national origin, and defendants' obstruction of justice.

### *A. Discriminatory Environment*

[9] Plaintiffs allege the existence of a racially discriminatory atmosphere at the SAPD in violation of 42 U.S.C. § 1981 and Title VII, 42 U.S.C. § 2000e. They claim that enough evidence was presented that a reasonable jury could have found the existence of a hostile work environment. . . . . This is a mischaracterization of the record. We affirm judgment to the defendants.

Plaintiffs do not distinguish between their causes of action under section 1981 and Title VII. They contend that parallel claims under section 1981 and Title VII should be assessed by like standards. The Supreme Court has stated, however, that while there is a "necessary overlap" between these two statutes, section 1981 does not apply to post-contract formation conduct unrelated to an employee's right to enforce his or her contract. *Patterson v. McLean Credit Union*, _ U.S. _, 109 S. Ct. 2363, 2374-75 (1989). Title VII, on the other hand, applies to racial harassment in the course of employment. *See id.* at 2374; *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986) (Court discusses Title VII's application to sexual harassment). Because plaintiffs' hostile atmosphere claim does not involve specific allegations of a refusal to make a contract or the impairment of their ability to enforce

contract rights, it should be analyzed under Title VII. *Patterson*, 109 S. Ct. at 2374.[7]

In the district court's pretrial order, it was agreed that Title VII claims would not be tried by a jury. We have held that a jury trial need not be provided in Title VII cases. *See Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *cf. Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 507 (9th Cir. 1989) (where plaintiff brings an equitable discrimination claim under Title VII and a legal claim under section 1981 based on the same facts, the trial judge must follow the jury's factual findings), *cert. denied*, __ U.S. __, 110 S. Ct. 1524 (1990). Accordingly, even if plaintiffs' discriminatory atmosphere claim is meritorious, we may not remand it for a jury determination.

In moving for a directed verdict, the defendants did not distinguish between plaintiffs' Title VII and 1981 claims. Likewise, in directing a verdict the district court did not make this distinction. The court found simply that "no reasonable person could find for the plaintiffs." In our review, however, we must make this distinction. We are not deciding whether the district court improperly took the issue away from the jury, but whether the district court erred in deciding the issue without hearing from the defense.

Federal Rule of Civil Procedure 41(b) allows the district judge presiding over a bench trial to decide the case following the close of the plaintiffs' case. In *Johnson v. United States Postal Service*, 756 F.2d 1461, 1464 (9th Cir. 1985), we held that a district court's factual findings made pursuant to Rule 41(b) should be reviewed under the clearly erroneous stan-

[7]Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" 42 U.S.C. § 2000e-2(a)(1) (1988).

dard. We also held that ultimate findings under Rule 41(b) are mixed questions of law and fact and are reviewed de novo. *Id.* at 1465. While the defendants did not make a Rule 41(b) motion, their motion for a directed verdict at the close of plaintiffs' case on an issue that will ultimately be decided by the judge has the same effect. Accordingly, we adopt the same standard of review.

We cannot say that the district court's ultimate conclusion, that the plaintiffs failed to prove the existence of a discriminatory atmosphere, is incorrect as a matter of law. The "directed verdict" is affirmed.

*B. First Amendment Claims*

[10] Sanchez and Torres allege that they were unlawfully retaliated against for exercising their first amendment rights in violation of 42 U.S.C. § 1983. Our review of the record indicates that reasonable jurors could find retaliation on one or more of these claims. These claim are remanded for jury consideration of the potential liability of Chief Davis, Captains Hansen and Stebbens, and Lieutenant Williams to Sanchez,[6] and the potential liability of Lieutenants Lewellen, Sterzer and Pitzer and Sergeant Bruns to Torres. The directed verdicts in favor of the City and the remaining defendants are affirmed. The specific instances testified to do not impose liability upon the City for the alleged retaliation by individual officers. Public entities are liable under section 1983 only when the constitutional violation occurs as a result of a policy or custom. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690-91 (1978); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122-23 (1988). Plaintiffs failed to prove the existence of such a policy or custom.

[6] In this appeal, we do not consider Sanchez's claims of retaliation for first amendment protected activity where the alleged retaliation is poor reviews and the removal of his merit pay. These claims are the same as those for which he received a jury verdict. *See Sanchez v. City of Santa Ana*, 915 F.2d 424, 426-28, 430-31 (9th Cir. 1990.)

"To make out a cause of action under section 1983, plaintiffs must plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes." *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1313-14 (9th Cir. 1989) (quoting *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987)). A violation of section 1983 occurs where an employee is wrongfully retaliated against for speech protected by the first amendment. *See Connick v. Myers*, 461 U.S. 138 (1983); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ. of Township High School Dist. 205, Will County Ill.*, 391 U.S. 563 (1968); *Allen v. Scriber*, 812 F.2d 426 (9th Cir.), *amended*, 828 F.2d 1445 (1987).

To make a successful claim for wrongful retaliation under the first amendment and section 1983, the plaintiff must prove that: (1) the statement that brought on the retaliation is one of "public concern;" (2) the constitutionally protected expression is a "substantial" or "motivational" factor in the employer's adverse decision or conduct; and (3) the interests of the plaintiff/employee in commenting on the matter of public concern outweigh the state's interest in maintaining efficient public services. *See Allen*, 812 F.2d at 430-32. The defendants concede or do not contest that the incidents alleged by Sanchez and Torres are protected under the first amendment.

Sanchez and Torres testified to numerous instances that a reasonable jury could have found to be unconstitutional retaliation. Plaintiffs testified that the above identified defendants reacted adversely to the formation of the LPOA, the LPOA meeting with city personnel, the submission of the LPOA packet, the filing of EEOC complaints, the instigation of legal activity, Torres's press conference, and Sanchez's and Torres's public support of Caro following his discharge. Moreover, both Sanchez and Torres testified to being ostracized and victims of a "silent treatment" and of selective enforcement of the rules, and Torres claimed that he was penalized

in his interview for the ATL position and received poor reviews. These claims of first amendment retaliation are therefore remanded for submission to the jury. Sanchez and Torres are entitled to a jury determination of whether the first amendment has been violated, and by whom, and what damages, if any, would be required to repair any injuries caused by the alleged retaliation.

The evidence, however, does not support a claim that the SAPD's policy of bringing grievances to authorities in the SAPD before bringing them to the City or the public, was unreasonable as to Sanchez. The Supreme Court has held that a public employer can impose reasonable limitations on the manner that employer grievances are handled. *Connick,* 461 U.S. 138. "The problem . . . is to arrive at a balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting efficiency of the public service it performs through its employees." *Pickering,* 391 U.S. at 568.

In applying this test, we have held that a police department has a great interest in protecting itself from false and unfavorable publicity generated by its employees. *Allen,* 812 F.2d at 432; *Boyd v. Gain,* 558 F.2d 553, 554 (9th Cir. 1977) (court refuses to expunge reprimands from personnel files of officers who issued public statements about the police department's stop and frisk tactics), *cert. denied,* 434 U.S. 1087 (1978). The SAPD's policy of bringing grievances first through appropriate channels to authorities in the department before bringing them to the City or the public is reasonable and not arbitrary. There was no constitutional violation in requiring officers to communicate "through channels" before enlisting public opinion to their cause.

*C. Discrimination/Retaliation*

All three plaintiffs claim that substantial evidence was presented to sustain their allegations that the defendants violated sections 1981, 1983, and Title VII by retaliating against them because of their race. Their claims are founded on the fourteenth amendment's equal protection and due process clauses. This directed verdict is affirmed. Caro's claims are barred. Sanchez received favorable verdicts from the jury on his separate fourteenth amendment due process claim.[9] There is no evidence to support Torres's claims; his grievances are best addressed under the first amendment analysis discussed previously.

*D. Conspiracies*

Plaintiffs claim that substantial evidence supports the inference of a single conspiracy managed and implemented by Chief Davis and Captain Hansen and involving all other defendants. They allege the same incidents of first amendment protected activities to support their conspiracy claim under section 1983. While we agree that enough evidence exists to reverse many of the directed verdicts, we do not find evidence to support a conspiracy claim under 42 U.S.C. § 1983.

Plaintiffs also claim that the defendants conspired to obstruct justice by deterring witnesses from testifying on behalf of Caro and by presenting false evidence at Caro's termination hearing depriving them of equal protection under the law in violation of 42 U.S.C. §§ 1985(2), 1986. This claim is meritless.

Section 1985 proscribes conspiracies to interfere with civil

[9]Our decision to vacate the award of $500,000 for emotional distress injury because it is barred by principles of res judicata, *see Sanchez*, 915 F.2d at 431-32, does not affect our decision here.

rights. A claim brought under the first and second clauses of section 1985(2) requires a direct or indirect purpose to deprive any persons of the equal protection of the laws, or the equal privileges or immunities under the laws and a class race-based animus. *See Kush*, 460 U.S. 719; *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Bretz v. Kelman*, 773 F.2d 1026, 1028 (9th Cir. 1985) (en banc). To be actionable, the conspiracy must result in overt acts, done in furtherance of the conspiracy, that are both the cause in fact and proximate cause of plaintiffs' injuries. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). A mere allegation of conspiracy without factual specificity is insufficient to support a claim. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 626 (9th Cir. 1988).

Plaintiffs allege the required class — Hispanic police officers — but their evidence of a conspiracy to obstruct justice aimed at the class is lacking. The basis of their claim is that state court proceedings were obstructed when defendants allegedly intimidated Officer Schuller from testifying on Caro's behalf. As noted above, this claim is barred by res judicata. Moreover, defendants have presented uncontroverted evidence that Schuller refused to testify of her own free will.

Plaintiffs also claim that Officer Fernandez was influenced to suppress evidence that Sergeant Dixon, who originally investigated Caro's complaint against Officer Bannon, was hostile to Caro. Plaintiffs presented evidence that Fernandez lied to the Personnel Board about his knowledge of Sergeants Dixon's potential bias. Even viewing this evidence in Caro's favor, however, one incident does not amount to substantial evidence of a conspiracy to obstruct justice directed at the class of Hispanic police officers.[10]

[10]Plaintiffs also allege that Chief Davis lied about the handling of the Caro matter when he testified in the state proceedings and that Lieutenant Williams inflated his state court testimony of Caro's excessive force charge. Neither of these incidents, however, evidence a conspiracy between two or more SAPD members.

Likewise, plaintiffs' claim against the individual defendants under section 1986 is meritless. "Section 1986 imposes liability on every person who knows of an impending violation of section 1985 but neglects or refuses to prevent the violation." *Karim-Panahi*, 839 F.2d at 626. A violation of section 1986 thus depends on the existence of a valid claim under 1985. *Id.*; *Trerice v. Pedersen*, 769 F.2d 1398, 1403 (9th Cir. 1985); *Mollnow v. Carlton*, 716 F.2d 627, 632 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

## INDIVIDUAL LIABILITY ON REMAND

[11] The individual defendants contend that they are immune from liability. We address their claim to guide the district court upon remand, and hold that the district court erred in ruling that the defendants were entitled to immunity because the law in this area was insufficiently clear. On remand, however, the court should also consider whether any of the defendants were performing discretionary functions and enjoyed qualified immunity for their actions on that basis.

Government officials performing discretionary functions enjoy qualified immunity from liability for civil damages as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Good faith qualified immunity attaches if the official's conduct is objectively reasonable "as measured by reference to clearly established law." *Id. See also Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987) (the contours of the right must be sufficiently clear to a reasonable official so that the actor would have understood that what he was doing violated that right).

[12] The causes of action upon which we reverse the directed verdict involve particular rights that were clearly established at the time of the alleged incidents. *See Connick v. Myers*, 461 U.S. 138 (1983)("for at least 15 years, it has

been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interests in freedom of expression."); *Gutierrez v. Municipal Ct. of Southeast Judicial Dist., Los Angeles County*, 838 F.2d 1031, 1050-51 (9th Cir. 1988) (governmental officials are not entitled to qualified immunity from a section 1981 or section 1983 action based on intentional discrimination), *vacated on mootness grounds*, _ U.S. _, 109 S. Ct. 1736 (1989); *Flores v. Pierce*, 617 F.2d 1386, 1392 (9th Cir.) ("[n]o official can in good faith impose discriminatory burdens on a person or group by reason of a racial or ethnic animus against them. The constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it."), *cert. denied*, 449 U.S. 875 (1980); *Rogers*, 454 F.2d at 238 (racially discriminatory atmosphere claim is actionable under Title VII).

## ATTORNEY'S FEES

Upon post-trial motion, the Sergeant-defendants and the other nine individual defendants were awarded attorney's fees under 42 U.S.C. § 1988. Plaintiffs challenge these awards.

The district court found that the plaintiffs abused the legal process and dragged innocent individuals through the court system. Plaintiffs contend that, because many of the defendants' motions for summary judgment were denied, their claims have merit and attorney's fees were improperly awarded against them. Both sides claim too much from the record. Court time was wasted by both sides, some of it on groundless claims by plaintiffs, some of it by litigation-happy defense tactics. The meters in the law offices were running, but fee shifting was not warranted in this case.

Under section 1988 a court may award attorney's fees to a prevailing defendant if the court finds that the plaintiff's

action is "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978). *See also Hughes v. Rowe*, 449 U.S. 5, 14-16 (1980) (applying *Christiansburg* to 42 U.S.C. § 1983 case). In *Jensen v. Stangel* we held that denials of motions to dismiss and summary judgment may suggest that a plaintiff's claims are not without merit. 762 F.2d 815, 818 (9th Cir. 1985). While defendants are correct in noting that in *Jensen* we reversed the attorney's fees award primarily upon other grounds, *Jensen* nevertheless, provides guidance.

As in *Jensen*, two trial judges presided over different parts of these proceedings. By denying many of defendants' motions for summary judgment, Judge Hill apparently believed that parts of the plaintiffs' case had enough merit to proceed to the next stage of litigation. Judge Kenyon, after hearing 39 days of trial, found that most of the claims were not proven or were otherwise barred. Logic and fairness dictate that where two judges disagree, attorney's fees should not be awarded en gross for bringing a frivolous case.

Massive fee awards against plaintiffs who continue to trial are contrary to Congress' goal of "promoting vigorous prosecution of civil rights violations under Title VII and § 1983." *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 619 (9th Cir. 1987). We therefore reverse the district court's award of attorney's fees. To the extent that the City had to finance heavy defense costs, there is abundant evidence in this record that the City could have avoided much of the problem by employing a less confrontational approach to departmental grievances after having recently been through, and losing, the *LULAC* litigation.

We need not address whether the allocation of the burden of the fee award was an abuse of discretion because we hold that no award was warranted.

APPENDIX O.26

The district court abused its discretion in denying attorney's fees to Sanchez. A plaintiff in a civil rights suit is a prevailing party and is entitled to an award of attorney's fees if he "has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.' " *Texas State Teachers Ass'n v. Garland Independent School Dist.*, _ U.S. _, 109 S. Ct. 1486, 1493 (1989). We remand to the district court to award reasonable attorney's fees, including fees on appeal, in connection with that part of the verdict affirmed in the City's companion appeal, *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990). The district court shall determine the amount of fees that can be attributed to the part of Sanchez's appeal that was successful, and shall award reasonable attorney's fees and costs to the extent of Sanchez's success, both for the work in the district court and on appeal.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.